Supreme Court, U.S.
FILED

02 1818 MAR 29 2003

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALVIN S.KANOFSKY, Ph.D., and DANIEL KANOFSKY,M.D.,M.P.H., individually And as joint executors of the ESTATE OF PAUL KANOFSKY, Ph.D., and As joint executors of the ESTATE OF PHILIP KANOFSKY,

Appellants,

Dr. ALVIN KANOFSKY - PETITIONER

Vs.

UNIVERSITY OF MEDICINE AND DENTISTRY of NEW JERSEY,LESLIE P. MICHELSON, Ph.D., RICHARD CALMAN, JERRY YORK,RON NAPIORSKI, STANLEY S. BERGEN, JR., HOWARD J. PRIPAS, MARILYN BODOW, PRUDENTIAL INS.CO., JOHN DOE(S) individually and in off.capacities,

Appellees

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES 3RD CIRCUIT COURT OF APPEALS, ENTERED IN PHILADELPHIA, PA., NO. 01-2860.

DR. ALVIN S. KANOFSKY
229 E. CHURCH STREET
BETHLEHEM, PA. 18018
610-867-8064

57pp

QUESTIONS PRESENTED

1. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals ignore arguments in favor of Dr. Kanofsky being able to perform his duties?

Dr. Kanofsky's own immediate supervisor, Patrice Gregory, in E mail communications admitted that Paul was definitely improving, and suggested that he be sent to assist at the other campuses and admitted in her deposition that he shouldn't be fired. Also, that they hadn't provided adequate accommodation. He had to learn a totally different computer system, DOS, than what he had been working on. His assisting at the help desk constituted only one day in five, and for most of the PC and programming questions, he performed adequately. In fact, with his statistical consulting, he performed at a level of expertise far beyond that of his supervisors who had no advanced statistical training. His supervisors and many of his clients had no appreciation of the level of analysis expertise that he was applying to solve their problems. Some indication of this was given in the expert testimony of Dr. Roberts and Dr. Thaler.In addition, the plaintiff's inquired of several of Dr. Kanofsky's clients as to his performance, and they

all considered him adequate to excellent. The demand that .he spend only a limited time on his projects, meeting deadlines, was more an indication of the superficial knowledge of his supervisors as to what was required, than an indication of any problem with Dr. Kanofsky.

2.Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals ignore arguments in consideration of his disabilities?

Dr. Kanofsky was learning his new duties under severely adverse conditions – based in the basement in a noisy distracting environment, with hostile resentful supervisors, who saw him as a threat to their authority and a challenge to their competence. His new job duties required intensive active use of both arms in interacting with the computer and thus he was at a severe disadvantage due to a paralyzed right arm limiting his manual dexterity. Eventually, they wore him down with their hostile actions, he became clinically depressed and then had to take a leave from work to seek Psychiatric treatment, thus being mentally disabled as well as physically disabled from his childhood polio. Judge Debevoise totally ignored any consideration of these as well as his being disabled from the cancer which followed from his deep depression and long work hours – working

weekends and late at night to meet the deadlines. Much of the criticism arose from his inability to learn while he was depressed.

3. Did Judge Debevoise of the Third Circuit Court and The Third Circuit Court of Appeals totally disregard consideration of the facts?

The Third Circuit Appeals Court dismissed all consideration of the facts by the statement "The Facts in this Case are well known." The facts, which are definitely in dispute, are a major part of the case certainly, and to dismiss them with no consideration whatsoever is totally contrary to law. For instance, Judge Debevoise 's decision that "indisputably" the transfer was because of the installation of the new billing system is erroneous. Both plaintiffs and defendants agree that the new billing system wasn't installed until at least two years after Dr. Kanofsky was transferred. As well, his skills were greatly disputed and have been vindicated by later assessments and events.

4. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals ignore arguments in the brutal firing of Paul Kanofsky, first in the initial termination meeting and then totally ignore mitigating circumstances of coming off a sick bed after cancer chemotherapy to appeal his firing.from the first meeting?

There could have been any more extreme treatment of Dr. Kanofsky than occurred at those meetings. At the first, he was already showing symptoms from the extremely aggressive cancer. He was subjected to extreme stress and humiliation, given an ultimatum that unless he resign, they would fight tooth and nail to prevent his getting any benefits(These included 13 weeks of sick leave). In the second meeting, he had come in from a hospital sick bed where he had undergone chemotherapy for his aggressive cancer, and he was again subjected to extreme stress and humiliation with the outcome of his employment hanging on his answering one question on DOS in his debilitated state.

5.Has Dr. Kanofsky 's competency been subsequently vindicated?

The State of New Jersey has determined that the performance of UMDNJ has been totally substandard and there is an urgent need to upgrade the quality and integrity of the University and Hospitals, as had frequently been indicated by Dr. Kanofsky's finding numerous flaws in the billing systems and the poor training of many personnel performing statistical analysis of the medical experiments and university data .The system is to undergo a total restructuring to upgrade the quality and integrity. Certainly, Dr. Kanofsky's

competency deserves to be viewed in light of the new emerging facts as nationally in cases where new relevant evidence comes to light.

6. Has Dr. Kanofsky's Whistle Blowing Activities been subsequently vindicated?

Later whistle blowing lawsuits at other Medical Institutions have shown that in the period immediately after Dr. Kanofsky was relieved of his duties in charge of the overall medical billings there were numerous cases of fraudulent over billings due to diagnosis upcodings. Dr. Kanofsky would have quickly been aware of these irregularities and would have prevented such fraudulent over billings. It was essential to remove Dr. Kanofsky from his position if there was to be any chance of UMDNJ engaging in such practices. Furthermore, it would have been very desirable to totally remove Dr. Kanofsky from the Campus. This explains the unrelenting brutal treatment of Dr. Kanofsky, eventually culminating in his getting cancer and his death. Again, Dr.Kanofsky's case should be viewed in light of these new findings, as has been done nationally in criminal cases where new evidence comes becomes available, as in the Innocence Project. However, in this instance, it would be in a civil case.

7. Should Justice Rendell have recused herself from the case?

Justice Midge Rendell should have recused herself from consideration of the lawsuit because of numerous conflicts of interest with the plaintiffs. One of the plaintiffs is both friends and acquaintances of close friends of Judge Rendell and her husband, Ed Rendell, the present Governor of Penna. Also, one plaintiff (Dr. A. Kanofsky) has been in litigation with the state of Pennsylvania for discrimination against his business activities in the City of Bethlehem through consistent long term adversarial actions against him by the City of Bethlehem(Allegedly, for his being Jewish). Most recently, he prevailed in a 5-2 En Banc Decision in Commonwealth Court.

8. Does the Federal Justices consistent dismissal of ADA and ADEA act lawsuits constitute cruel and unusual punishment to those wrongfully discharged and their families? The victims and families are twice victimized.

Apparently, the prevailing practice of the Federal Justices is to consider these lawsuits frivolous and summarily dismiss them without ever letting them proceed to trial. For example, in the Ditzell Case against UMDNJ, which proceeded the Kanofsky

case, summary judgement dismissing the case was found. Herb Ditzell(a lifetime survivor of a rare form of cancer(Wilm's Tumor) and who had been UMDNJ's publicity head) could no longer afford to proceed in the case, and shortly afterward died. Such treatment twice punishes those unjustly terminated – first with the termination itself, and secondly with all the time and expense involved in pursuing the lawsuits under the belief that there is a chance they will prevail. If there is only a minimal chance of their proceeding to trial, then certainly it should be let known to those who are considering such lawsuits. Apparently, a similar prevalent practice was common for those wrongfully discharged in Federal employment. Currently, President Bush and the Attorney General are in the process of remedying that situation.

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APPENDIX B OPINION OF THIRD CIRCUIT COURT OF APPEALS

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OPINIONS BELOW

Appendix A contains the opinion of the Third Circuit Court Judge Debovoise.

Appendix B contains the opinion of the Third Circuit Court of Appeals – Justices Roth, Rendell, and Ambros.

JURISDICTION

This case originates from a Complaint filed by the Appellants Alvin Kanofsky, Ph.D. and Jacob Daniel Kanofsky, M.D., M.P.H, individually, and as joint executors of the Estate of Paul Kanofsky, Ph.D., and as joint executors of the Estate of Philip Kanofsky, on behalf of their deceased older brother, Dr. Paul Kanofsky ("Dr. Kanofsky"), against the University of Medicine and Dentistry of New Jersey ("UMDNJ"). The original complaint was filed on June 25, 1996, for violations stemming from the decedent's employment with UMDNJ.

On November 18, 1996, the Appellants filed an Amended Complaint, adding the Prudential Insurance Company of America("Prudential") as a Defendant. Prudential filed an Answer of January 10, 1997. The New Jersey Attorney General's office filed an answer of behalf of all UMDNJ Defendants on March 27, 1997. On September 15, 1998, the District Court entered on Order dismissing the Complaint with Prejudice as to Defendant Prudential

On August 15,1997, the Appellants filed a motion seeking leave of court to file a Second Amended Complaint. In an opinion and order

dated September 30, 1997, the District Court granted the Appellants motion for leave to file a Second Amended Complaint so far as it sought to add a claim under the False Claims Act, 31 U.S.C. 3729, and additional UMDNJ employees, and denied the Appellants motion so far as it sought to add the Estate of Philip Kanofsky and a claim of loss of consortium.

UMDNJ filed a motion for summary judgement on January 8, 2001, and a cross-motion for summary judgement was filed by Appellants on March 30, 2001. Oral argument was heard in support of the respective motions on January 11, 2001. In an opinion and order, dated June 12, 2001, the District Court erroneously granted Appellees' motion and denied Appellant's cross motion.

On July 1, 2001, a substitution of Attorney for the Appeal was executed and a timely notice of appeal was filed, seeking review of the District Court's Opinion and order, which erroneously dismissed Appellants claims on summary judgement. The appeal was submitted to the Unites States Court of Appeals for the Third Circuit on August 1, 2002, and was before Circuit Judges Roth, Rendell, and Ambro. Justices Roth Rendell, and Ambro then affirmed the judgement of the District Court on October 30, 2002.

A notice of appeal to the Supreme Court was filed and followed by a Application for an Extension of Time to file a Petition for a Writ of Certiorari to Justice David H Souter on January 16, 2003 which was then granted by Justice Souter to run through March 29,2003.The petition was mailed on March 29, received April 3, and a letter by the court's clerk sent out April 4 to make corrections in the form of the petition, with a 60 day period for filing from the date of the letter.

CONSTITUTIONAL AND OTHER
STATUTORY CONSIDERATIONS

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Fed R, App. P.3

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STATEMENT OF THE CASE

Dr. Kanofsky was a childhood survivor of polio, who was diagnosed with the disease at the age of five. A159(Medical file). Although Dr. Kanofsky overcame the disease, his bout with polio left him with a partially paralyzed right arm. A159(Medical File) Dr. Kanofsky' s physical handicap did not prevent him from pursuing his educational goals and he went on to earn a Master of Arts degree in Mathematics from Temple University, Philadelphia, PA, in 1960 and a Ph.D. in Experimental Statistics from the North Carolina State University, Raleigh, NC, in 1965. A168 (Resume)

In 1983, Dr. Kanofsky gained employment as a System Analyst I with UMDNJ in the Hospital Management Information Systems, in Newark, New Jersey. A167(Kanofsky Resume). For nearly a decade, Dr. Kanofsky received the highest possible rating on his annual evaluations A88-107(1983 to 1991 evaluations). His evaluations indicated "Outstanding" and "Superior" performance, and included additional comments

such as "Paul is an excellent addition to the University. His knowledge of quantitative techniques is outstanding;' A89 (November, 1988 evaluation). "Superior performance for IST established report writing software for SAS. Excellent relationship with user and UMD community."A99(October, 1988 evaluation).

Beyond the subjective reviews providing accolades for his exceptional performance, Dr. Kanofsky objectively proved his value to the UMDNJ. For example, in 1991, Dr. Kanofsky's statistical work uncovered a glitch in the accounting program that directly led to UMDNJ recouping $50 million in billings. A114 (IST's Monthly Report).

Around 1993, a restructuring of Dr. Kanofsky's department began. A199(Calman deposition at p93, ln 18-22). One of the steps taken by Richard Calman, who oversaw the restructuring was to "counsel" Dr. Kanofsky's direct supervisor about his evaluations of Dr. Kanofsky, indicating that he wanted evaluations more "forthright" with its criticisms. A199(Calman deposition at p94, ln 9-17). Mr. Calman was aware of Dr. Kanofsky's physical disability, noting that "it was very obvious." A200(Calman deposition p 104, ln 2).

After nearly a decade of the highest possible ratings, Dr. Kanofsky, for the first time, began to

receive negative reviews. The initial hint of negativity came in a 1992 review. A119(October, 1992 evaluation). Dr. Kanofsky is subjectively criticized for a "lack of self confidence" and it is suggest that he "modify his outward appearance" so as to improve the impression made with end users. A119(October, 1992 evaluation). This is in stark contrast to Dr. Kanofsky' review from the year just prior, praising Dr. Kanofsky for his ability to produce accurate reports on short notice. A110(November, 1991 evaluation).

The suspicious nature of Dr. Kanofsky's evaluations continued throughout the remainder of his employment. For example, in a memo dated April 28, 1994, the Director of Human Resources of UMDNJ questions the "appropriateness" of an addendum to a June, 1993 evaluation of Dr. Kanofsky, due to its late submission and the fact that Dr. Kanofsky was not provided the opportunity to review and sign the document. A134(Hanos Memo)

In June 1993, Dr. Kanofsky was inexplicably transferred and subsequently demoted from a System Analyst I in the UMDNJ's Hospital Management Information Systems, to a System Analyst II in the UMDNJ's Academic Computing. A178-9 (Bodow Affidavit pp2-3). Mr. Calman, the

UMDNJ director who oversaw transfer and demotion, admitted that such situations were extremely rare, stating that since 1992 he has made no other similar transfers between divisions. A197(Calman deposition pp75-77, ln 25-4).

Contrary to UMDNJ's claims, Mr. Calman testified the new billing system was not installed until 1995, years after Dr. Kanofsky's transfer and demotion. A202(Calman deposition at pp121, ln1-22). Further, in September 1994, UMDNJ advertised a job opening for a position essentially identical to the one previously held by Dr. Kanofsky. A 139 (Job Posting)

Dr. Kanofsky's discovery of massive misbillings, whether deliberate or otherwise, and his continued efforts at maintaining the efficiency and integrity of the University meant that he served in a whistle-blowing capacity as set forth in the False Claims Act part of the Amended Lawsuit, and that he would quickly detect any other irregularities (as he indeed did, even after being transferred to this new position – Evaluation Reply DA52) in the billing procedures, and would serve to prevent any further fraudulent procedures either contemplated or actually engaged in, such as the fraudulent overbillings on diagnosis upcoding pursued by hospitals directly after the time of his

transfer to a new position.

Dr. Kanofsky's demotion also entailed a significant change in job duties, including physical tasks that were difficult for him due to the partial paralysis of his arm. A211-21(Slott deposition pp81-82, ln 9-25). Marty Feurman, who was not Dr. Kanofsky's supervisor but often provided Dr. Kanofsky with assignments in the Academic Computing department, provided testimony that Dr. Kanofsky was not given sufficient time to become acclimated to his new position. "It was a very demanding environment, complex, very demanding clientele. There was a lot of things to learn. And it have been – considering his background, perhaps, possibly, probably, it was – he didn't have enough time to get acclimated to it." A203 –204 (Fuerman deposition pp 36-37, ln21-2). Mr. Feurman indicates that the transfer to Academic Computing not only required that Dr. Kanofsky learn an entirely new operating system, but also entailed acclimating to a different "psychological environment" due to the tremendous increase in clients served. A205 (Feurman deposition page 37, ln 1-17).

In fact he went from programming and running on the large mainframe at the University where he used punched cards to a position where he ran programs and assisted in programming

questions on Personal Computers (PC's) using the Microsoft DOS system. This system ,as anyone who has used it knows, is very unwieldy and complicated and not at all robust – that is, it is subject to catastrophic failure or hang -up, where it requires a total rebooting by pushing the power-on switch first off, and then on. At the time of his transfer, Microsoft was in the process of augmenting and replacing DOS (as presented to the user) with Windows, a system similar to that used earlier by Apple Computer Corp on their Mac computers. This system uses ICONS and a mouse with click and drag capabilities and is much easier for users to achieve some competency. Furthermore, with the PC, it is essential to enter instructions and text using the keyboard. To do this in front of users would be very embarrassing and stressful for Dr. Kanofsky, since his right hand could not rise from the table due to atrophied muscles from childhood infantile paralysis.

Apparently, UMDNJ, for all of its arrogant claims had not yet advanced to the Windows system.In the time leading up to Dr. Kanofsky's termination, e – mails were exchanged between his supervisors in which the issue of the best way to terminate his employment was discussed. In one e-mail, Patrice Gregory, Dr. Kanofsky's direct supervisor, acknowledged that her previous evaluation of Dr. Kanofsky was favorable and says that she "would

do whatever it takes" to incorporate language that would better support a decision to terminate his employment in future evaluations. A155(Gregory e-mail). In another e-mail, the concern is raised that the UMDNJ's actions are illegal, noting the similarity between Dr. Kanofsky's situation and another employee who was currently suing UMDNJ for ADA discrimination. A152 (Gregory e-mail)

As well, he was faced with an enormous number of medical clients (Medical Doctors, Researchers, Nurses, etc.), with complicated statistical problems that required a great deal of thought as to the proper and best analysis to perform on the data and the best way to run the experiments. . As a Medical Statistician who had spent many years analyzing medical data, Dr. Kanofsky fully appreciated the difficulties of the tasks, and admirably pursued them, trying various alternative analysis, evaluating the various methods, and judiciously choosing the proper methods. This was unlike Ms. Patrice Gregory who did not have any degree in Statistical Analysis, but rather just turned the crank of the SAS statistical program irregardless of whether the method she was using to evaluate the data was valid or not. It's small wonder that she complained that Dr. Kanofsky was not meeting his deadlines, since she had little understanding or appreciation

of what constituted a proper statistical analysis or experimental design. To meet such deadlines, he started working long hours, staying late, and working weekends. Dr. Kanofsky's analysis and written presentations are models of an advanced intellect as stated by the expert witnesses evaluating his work and by statements from satisfied users.

Under a continual barrage of criticism and harassment, his body gave way. He had a nervous breakdown, an episode of major depression. They continued to pursue him while he was out undergoing psychiatric treatment and again with more vigor upon his return, criticizing his slow learning of DOS while clinically depressed (a symptom of depression) , his turning off the computer (something everyone does to reboot the DOS system once it has hung up) – in fact every little thing they could find to get something on this honest hardworking brilliant man. Eventually, he came down with an aggressive lymphoma and they fired him the day before he went in for scheduled hospital treatment, knowing full well that he was seriously ill.

This relentless disregard for dedication, honesty, and quality has finally come home to roost, doubtless from much criticism from NIH, other funding agencies, and foundations as to the

quality of the work at UMDNJ. As well, the New Jersey Drug companies were ill served by the arrogant, incompetent staff of UMDNJ. A great deal of their drug research and clinical trials are now suspect. Now, there will be a total restructuring of UMDNJ, but it is too late to resurrect Dr. Kanofsky. He was a victim of the system. He has already been executed by his incompetent unfeeling tormentors.

The most telling admission made by Ms. Gregory was in her deposition when questioned as to whether she felt Dr. Kanofsky had improved sufficiently and subsequently should not have been fired, "I(Ms. Gregory)volunteered that before you even asked me. When you asked me "Did you recommend that he (Dr. Kanofsky) be fired, I said 'no'" A209(Gregory deposition p 140, ln3-11).

The true malice of UMDNJ's treatment of Dr. Kanofsky is revealed in the relentless pursuit of his final termination. Dr. Kanofsky's supervisors knew his "love" for his work was well documented in his reviews. A102(October, 1989 evaluation). They held this man responsible for not answering one "simple" DOS question. We doubt that any of them could have answered such a question under similar circumstances of tremendous stress and debilitating illness(i.e.

coming off a hospital sickbed after extensive intensive chemotherapy), or that they would even have had the courage to show up for the appeal hearing. His supervisors even contemplated the devastating impact that their actions would have on him. A152 (Gregory email). The lack of decency and humanity with which UMDNJ treated Dr. Kanofsky spurred him to request in his Last Will and Testament, that his brothers pursue his claim against UMDNJ. A156. Dr. Kanofsky's final termination hearing was held on December 6, 1994, just two days prior to his death. A172(Slott letter). Dr. Kanofsky died at the age of 58. A((Medical file).

REASONS FOR GRANTING THE PETITION

This case raises several interesting questions of law and national public issues.

1. One is whether an individual is to be penalized and retaliated against for serving in a exemplary capacity for the public good (as a watchdog on the fiscal behavior and competency of a public not-for-profit institution) by preying on his disability weaknesses.

2. Another is whether in a civil case an individual is entitled to a rehearing on the basis of subsequent facts and actions that vindicate the individual, as is the case with the State of New Jersey totally restructuring the state run UMDNJ system for its deficiencies, so highlighted by Dr. Kanofsky, and for which he was persecuted . As well, there are the subsequent national whistle blower cases for tampering with the medical billings. In the Innocence project, so called convicted criminals are entitled to a rehearing on subsequent evidence. Why not in civil cases?

3. Another is the abuse of the national public

health care system by the administrators of the institutions providing the care, and the retaliation by such administrators against those who serve as reformers of those institutions.

4. Another concern, of law, is the total disregard for consideration of the disputed facts in the case. There are numerous disputed facts, which have been disregarded by the Justices.

5. Another, of law, is the pattern of finding such ADA cases frivolous without letting them proceed to trial. This calls into question the entire efficacy of the ADA, and whether it is at this point just a sham set up to exhaust the resources and frustrate those it seeks to protect.

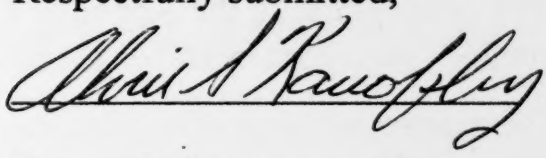
6. Another consideration, of law and national public policy, is the failure of Justice Rendell to recuse herself. There are numerous conflicts of interest, and substantial national and international interests at stake if indeed the mutual local 'friends' and acquaintances are deeply committed to anti-Semitism on a local, national, and international scale.

7. Finally, the Appellants' claims of discrimination and intentional infliction of emotional distress were both erroneously dismissed on summary judgement. The Appellants (i.) established a prima facie case of discrimination and (ii) adequately alleged facts sufficient to support a claim of intentional infliction of emotional distress. Therefore, District and Appellate Court's order granting the Appellee's motion for summary judgement must be reversed.

CONCLUSION

Based on numerous considerations of law and concerns of national public policy , as stated above, we believe that there are numerous compelling reasons for the Supreme Court to consider this case.

Respectfully submitted,



Date: JUNE 2, 2003

UNITED STATES DISTRICT COURT OF NEW JERSEY

ALVIN KANOFSKY, Ph.D., and
DANIEL KANOFSKY, M.D., M.P.H.,
Individually, and as joint
Executors of the ESTATE OF
PAUL KANOFSKY, Ph.D., and
As joint executors of the
ESTATE OF PHILIP KANOFSKY

Plaintiffs,

-against- Civ.No.96 –3007 (DRD)

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,
LESLIE P. MICHELSON, Ph.D.,
RON NAPIORSKI, STANLEY S.
BERGEN, JR., MARILYN BODOW,et.al

Defendants.

Anat Gordon, Esq.,Edison, N.J. Atty.for
Plaintiffs
Michael Freeman, Esq.,Newark, N.J.Atty.
for Defendants

DEBEVOISE, Senior District Judge

This is a wrongful discharge case brought by Alvin Kanofsky, Ph.D., and Daniel Kanofsky, M.D., M.P.H., individually and as joint executors of the estates of Paul Kanofsky, Ph.D. and Phillip Kanofsky against the University of Medicine and Dentistry of New Jersey ("UMDNJ"), Leslie Michaelson, Ph.D., Richard Calman, Jerome York, Ron Napiorski, Stanley Bergen , Jr., M.D., Howard Pripas, and Marilyn Bodow.[1] The Plaintiffs collectively will be referred to herein as "plaintiff." Dr. Paul Kanofsky (who will be referred to herein as "Dr. Kanofsky") was a systems analyst at UMDNJ's University Hospital from 1980 until 1993, when he was transferred to become a programmer analyst with UMDNJ's Academic Computing Department. He held that position until October 28, 1994, when he was terminated. Dr. Paul Kanofsky died on December 10, 1994. This action was commenced thereafter. Presently pending are defendants motion for summary judgment and plaintiff's cross-motion for summary judgment.

FACTS

Prior to his employment in Academic Computing,

[1]The complaint was dismissed with prejudice as to defendant Prudential on September 15, 1998.

Dr. Kanofsky was systems analyst with the Management Information System Department at UMDNJ's University Hospital, where he analyzed the hospital's billing system until July 1993. Upon the installation of a new billing system at the hospital, Dr. Kanofsky was transferred to Academic Computing because his skills were no longer required in light of the new system. (Calman Aff., Parags. 10 - 12) His resume indicated that he had a background in statistics and knowledge of computers in an academic environment.

Plaintiff alleges that in spite of Dr. Kanofsky's outstanding performance as a systems analyst with the University Hospital, due to his age (he was 58 at the time (Parag.2d Am. Compl. Paragragh 56) and "handicapping condition" he was transferred and demoted to become a programmer analyst in Academic Computing. (Parags.2d Am. Compl. 3,18). Plaintiff alleges that Dr. Kanofsky was discriminated against because he suffered depression and because his right arm was visibly limp as a result of the polio he contracted at age 5. Plaintiff alleges that Dr. Kanofsky's limp arm impaired his gross and fine motor skills such as placing disks into a computer. (2d Am. Compl. Parags. 14-40). One evaluation indicated that the "impression that Paul makes

with end users would be improved if Paul modifies his outward appearance by demonstrating greater self-confidence," which plaintiff alleges referred to Dr. Kanofsky's limp arm. (2d Am.Compl.Parags.24,26) Plaintiff does not know whether Dr. Kanofsky was replaced by a younger worker with no disability, although he does allege that "his job was posted"(2d Am. Compl. Parag. 26,56)

Plaintiff alleges that Dr. Kanofsky suffered depression due to his transfer.(2d Am. Compl.Parag.28) However, plaintiff also alleges that Dr. Kanofsky was discriminatorily transferred because of his depression.(2d Am. Compl. P 28,29) Plaintiff alleges that Dr. Kanofsky was not trained for his new position.(2d Am. Compl. Parag. 28). However, defendants' submissions indicate that upon his transfer to Academic Computing, Dr. Kanofsky received a significant amount of one-on-one training from his immediate supervisor, three days of one-on-one training from another statistician, was sent to take courses and was given computer manuals(Bodow Aff. Parag.8) Dr. Kanofsky's self-generated monthly reports indicate that he spent 138 hours on training. (Bodow Aff. Parag. 9)

Dr. Kanofsky refused to accept a computer for home-training purposes, attended supervisory

meetings to review his work, received numerous e-mails alerting him to his unsatisfactory performance, received complaints from clients, and received unsatisfactory evaluations. (Bodow Aff.Parags.11-18, 33, 35) Specifically, evaluations indicated that Dr. Kanofsky was unable to complete simple assignments on his own, failed to report troublesome installations, missed deadlines, failed to give customers understandable recommendations, and that generally his performance was slow and ineffective.
(Bodow Aff. Parags. 8, 9, 13,32)

Plaintiff alleges that defendants assigned Dr. Kanofsky to tasks outside of his area of expertise, handed down arbitrary deadlines and scolded him, all in a conspiracy to inflict personal injury upon him and causing such stress that Dr. Kanofsky suffered grievous bodily injury in the form of "a decrement in his natural killer cell activity" which led to the "rapid progressive growth" of his existing lymphoma, which ultimately led to his death. (2d Am. Compl. Parags. 42 – 48, 52)

Dr. Kanofsky was terminated on October 28, 1994. The decision to terminate him was made by defendants Michelson, York, and Bodow, in consultation with the Human Resources and Legal Management Department. It had been determined

that Dr. Kanofsky could not perform his work in a timely, satisfactory, and professional manner. (Michelson Aff. Parags. 6)

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the moving party established that "there is no genuine issue as to any material fact and that(it) is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissable evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. (Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Once the moving party has carried its burden under Rule 56, its opponent must do more than simply show that there is metaphysical doubt as to the material facts in question." Matsushita Elec Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586-87 (1986), rev'q 723 F.2d 238(3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its

pleadings. Sound Ship Bldg. Corp. v. Bethlehem Steel Co. 533 F. 2d 96, 99(3d Cir.), cert. denied, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. Id. at 247 –248.

DISCUSSION

A. DISCRIMINATION

1. Count One: Alleged discrimination based on handicap

Plaintiff alleges that Dr. Kanofsky was discriminated against because he suffered depression and because his right arm was visibly limp as a result of the polio he contracted at age 5. Plaintiff alleges that Dr. Kanofsky's limp arm impaired his gross and fine motor skills such as placing disks into a computer. (2d Am. Compl. Parags. 14 –40)

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. Secs. 12101 et seq., prohibits an employer from discriminating against "a qualified individual with a disability because of the disability of such individual." 42 U.S.C. Secs. 12112(a). A "qualified individual with a disability" is a person with a disability who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S. C. Secs. 12111(8). A disability is defined by the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S. C. Secs. 12102(2).

The New Jersey Law Against Discrimination("NJLAD")similarly prohibits unlawful discrimination in employment because of a person's handicap, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment. N.J.S.A. 10: 5 – 4.1. [2]

[2] Counts Five, Nine, and Seventeen of the Second Amended Complaint appear to allege claims of common law discharge.Such claims are supplanted when the statutory remedy of the NJLAD is available. See De Joy v. Comcast Cable Comm. , Inc., 941 F. Supp. 468, 475-76 (D.N.J. 1996)

ADA and NJLAD claims are governed by the same standards. Lawrence v. National Westminster Bank. 98 F.3d 61, 70(3d Cir. 1996), which involves application of the burden-shifting framework applied in Title VII cases. The plaintiff bears the burden of establishing a prima facie case of discrimination, the burden then shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action, and if the defendant satisfies its burden then the plaintiff must come forth with evidence indicating that the defendant's proffered reason is merely a pretext. See McDonnell Douglas Corp. v. Green 411U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)

In order to establish a prima facie case of discrimination under the ADA, a plaintiff must show that he is a disabled person within the meaning of the ADA, he is otherwise qualified to perform the essential functions of the job (with or without reasonable accommodations by the employer) and that he has suffered adverse employment action as a result of discrimination. Taylor v. Phoenixville Sch. Dist., 184 F. 3rd 296, 306 (3d Cir. 1999) To establish a prima facie case under the NJLAD, a plaintiff must establish that he is handicapped within the meaning of the NJLAD, that he was performing his job at a level that met his employer's legitimate expectations, that he was

nevertheless fired and that the employer sought someone to perform the same work after he left. Jansen v Food Circus Supermarkets, Inc. 110 N.J. 363,382 (1988)

Discrimination under the ADA includes adverse actions motivated by prejudice and fear of disabilities as well as the failure to make reasonable accommodations for a plaintiff's disabilities. See Taylor, 184 F 3d at 306. The ADA specifies that discrimination against a qualified individual with a disability arises when the employer does not make " reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.... Unless the (employer) can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the (employer)." 42 U.S.C. Sec. 12112(b) (5) (A).

Plaintiff cannot establish a prima facie case of discrimination under the ADA because the undisputed evidence establishes that Dr. Kanofsky was not otherwise qualified to perform the essential functions of the job with or without reasonable accommodations. The undisputed evidence supports the conclusion that Dr. Kanofsky was transferred because his skills were no longer required as an analyst at University Hospital once the billing system was upgraded.

(Calman Aff.Parags. 10-12), and that he was discharged because he could not perform his work in a timely, satisfactory, and professional manner.(Michelson Aff.Parag. 6) Moreover, he never asked for an accommodation. There is no indication that any alleged disability played a role in the decisions to transfer and ultimately terminate Dr. Kanofsky. He alleges that his limp arm impaired his gross and fine motor skills such as placing disks into a computer. (2d Am. Compl.Parags.14-40) However, as one of the defendants indicates, the process of placing disks into a computer requires only one hand and Dr. Kanofsky had full use of his left hand. (Bodow Aff.Parag. 55). Additionally, although plaintiff cites an evaluation indicating that "the impression that Paul makes with end users would be improved if Paul modifies his outward appearance by demonstrating greater self-confidence" as referring to his limp arm (2d Am. Compl. Parags. 24, 26), on its face and as clarified by one of the defendants, that evaluation was not referring to Dr. Kanofsky's physical appearance but rather to his lack of confidence. (Calman Aff.Parag. 20)

Plaintiff cannot establish a prima facie case of discrimination under the NJLAD because Dr. Kanofsky was not performing his job at the level expected by his supervisors and there is no indication that upon his transfer or dismissal his

supervisors sought to replace him.

Even if plaintiff could establish a prima facie case under the ADA and or the NJLAD, defendants have articulated legitimate non-discriminatory reasons for the employment actions taken: Dr. Kanofsky was transferred because his skills were no longer required after the upgrade and he was discharged because he did not perform his work in a satisfactory and timely manner. There is simply no evidence put forward by plaintiff that the articulated reasons are pretextual.

2. Count Four: Alleged Discrimination Based on Age

In an age discrimination case brought under the Age Discrimination in Employment Act("ADEA"), 29 U.S.C. Parag.621 et seq. In the absence of direct evidence, a plaintiff may make out a prima facie case by showing that he (1) is a member of the protected class: (2) is qualified for the position ; (3) suffered an adverse employment decision; and (4) in the case of demotion or discharge, was replaced by a sufficiently younger person to create an inference of discrimination. See Chipollini v. Spencer Gifts, Inc. 814 F 2d 893,897 (3d Circ. 1987). Age discrimination claims under the NJLAD are governed by the same standards as

the ADEA. See Lawrence , 98 F 3d at 65.

Plaintiff concedes that he cannot establish that Dr. Kanofsky was replaced by a younger person . (2d Am. Compl. Parag.56 Calman Aff. Parag. 24). Therefore, plaintiff cannot establish a prima facie case of age discrimination. Additionally as discussed supra, Dr. Kanofsky was not qualified for the position and cannot establish that he was replaced at all (let alone replaced by a sufficiently younger person to create an inference of discrimination). However, even if plaintiff could establish a prima facie case, defendants have articulated a legitimate, non-discriminatory reason for the adverse employment decision, as discussed supra. Dr. Kanofsky was transferred because his skills were no longer necessary after the upgrade and he was dismissed because he did not perform his work in a satisfactory and timely manner. There is simply no evidence put forth by plaintiff that the articulated reasons are a pretext for age discrimination

B. Counts Alleging Conspiracy and Infliction of Emotional Distress (Two, Six, Eight, Eighteen).

Count Two(which was already disposed of supra) alleges conspiracy to inflict injury on Dr. Kanofsky by harassing him. Count Six alleges that defendants conspired to reduce Dr. Kanofsky's

benefits and to wrongfully terminate him. Count Eight alleges that defendants conspired to intentionally or negligently inflict emotional distress on Dr. Kanofsky.

The essential elements of civil conspiracy are (1) a combination of two or more people, (2) who make an agreement with a common design, (3) with the existence of an unlawful purpose to be achieved by unlawful means, (4) an overt act in furtherance of the conspiracy, (5) and special damages. See Eli Lilly and Co. v. Roussel Corp., 23 F Supp. 2d 460, 496 (DNJ 1998) Those elements must be pled with factual specificity. See Kronfeld v. First New Jersey Nat'l'Bank 638 F. Supp. 1454, 1468 (D.N.J. 1986). Additionally, conspiracy is not actionable absent an independent wrong. Eli Lilly, 23 F. Supp. 2d at 496.

Plaintiff has failed to plead with specificity the elements required to establish a claim of conspiracy. There is no allegation of an agreement, an unlawful purpose, an overt act in furtherance of the conspiracy, or special damages.

Additionally, plaintiff has failed to allege adequately a claim of intentionally infliction of emotional distress, which under New Jersey law requires a showing of (1) extreme and outrageous conduct; (2) intent to commit both the act and the emotional distress; (3) proximate cause; and

(4)that the emotional distress was so severe that no reasonable person could endure it. See Buckley v. Trenton Saving Fund Soc'y 111N.J. 355 366-67 (1988). A cause of action for negligent infliction of emotional distress requires(1) death or serious physical injury of another caused by defendants' negligence,(2) a marital or intimate familial relationship between the plaintiff and the injured person: (3) observation of death or injury at the scene: and (4) severe emotional distress. See Erit v. Judge, Inc. 961 F. Supp. 774, 781 (D.N.J. 1997) Plaintiffs has not alleged any acts even approaching that which is required to state a cause of action of intentional or negligent infliction of emotional distress.

C. Counts pled in Negligence (Three, Eight, Ten, Eighteen , and Twenty)[3]

Plaintiff alleges that as result of job stress caused by defendants' harassment, Dr. Kanofsky suffered grievous bodily injury " in the form of a decrement in his natural killer cell activity, which ultimately led to his death" and seeks recovery under the Wrongful Death Act , N.J.S.A. 2A; 31-1 et seq. (2d Am. Compl. Counts Two, Three and Twenty). These Tort based claims arising out of Dr. Kanofsky's employment relationship with

[3] Many of the counts in the Second Amended Complaint have numerous basis for dismissal

UMDNJ are barred by the exclusive remedy of New Jersey's Workers' Compensation Act, N.J.S.A. 34: 15 –1 et seq. In the absence of an express statement to the contrary, every employment relationship is presumed to incorporate the Workers' Compensation system. N.J.S.A. 34 : 15-9. Workers Compensation covers personal injuries arising out of the course of employment. NJSA 34 : 15 – 7 . An employee's remedy against an employer for work related injuries is to seek Workers'Compensation benefits; tort claims against an employer are barred by the Workers' Compensation Act's exclusive remedy provision.N.J.S.A. 34 :15-7 Sloan v. Luvando 305 N.J. Super. 140 (App. Div. 1997) All degrees of negligence are subject to the exclusive remedy of Worker's Compensation See Millison v. I. E.duPont de Nemours. 101 N.J. 161, 165 (1986)

Because Counts Three, Eight, Ten, Eighteen and Twenty allege tort claims, they are barred by the Workers' Compensation Act.

DICKINSON R. DEBEVOISE U.S.S.D.J
DATD: June 12, 2001

CONCLUSION

For the reasons set forth above, plaintiff's motion is denied and defendant's motion is granted. An appropriate order shall follow.

/s/ Dickinson R Debevoise,
U.S.S.D.J.

Dated: June 12,2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALVIN KANOFSKY, Ph.D., and DANIEL KANOFSKY, M.D.,M.P.H. individually, and as joint executors of the ESTATE OF PAUL KANOFSKY, Ph.D., AND as joint executors of the ESTATE OF PHILIP KANOFSKY

Appellants

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY; LESLIE P. MICHELSON, PH.D; RICHARD CALMAN;STANLEY S. BERGEN, JR. HOWARD J. PRIPAS, Marilyn Bodow, et.al.

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 96-cv-03007)
District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit LAR 34.1on Aug. 1, 2002

Before:ROTH, RENDELL,and AMBRO Circuit Judges

Opinion Filed:October 30, 2002

OPINION

ROTH, Circuit Judge

Alvin Kanofsky and Daniel Kanofsky, individually and as the executors of the Estate of Paul Kanofsky, appeal the granting of summary judgment to defendants by the Unites States District Court for the District of New Jersey. The action for age and disability discrimination and intentional infliction of emotional distress was brought on behalf of their brother, Paul Kanofsky, now deceased of unrelated causes. They contend on appeal that the District Court erred in granting summary judgement because (1) they had established a prima facie case of disability discrimination, (2) they had established a prima facie case of age discrimination, and (3) they had adequately alleged a claim of intentional infliction of emotional distress.[1]

We have appellate jurisdiction pursuant to 28 U.S.C.Sec. 1291. Our review of a District Court's grant of summary judgment is plenary . See Ideal Dairy Farms, Inc. v. John Labatt, Ltd. 90 F 3d 737, 743 (3d Cir. 1996).

[1].We do not consider the Estate of Philip Kanofsky to be a party to the appeal because the District Court denied appellants' motion to add that Estate as an additional plaintiff.

"Viewing the facts in the light most favorable to the nonmoving party, we look to see if there was genuine issue of material fact and, if not, whether the moving party was entitled to judgment as a matter of law." Gaul v. Lucent Tech., Inc., 134 F.3d 576,579 (3d Cir. 1998)

We will not recite the facts herein as the parties are familiar with them.

Discrimination Claims

We do not consider the estate of Philip Kanofsky to be a party to the appeal, because the District Court denied appellants' motion to add that Estate as an additional plaintiff.

Appellants claim that they established a prima facie case of both disability and age discrimination. We disagree.

First, as to disability, to establish a prima facie case of discrimination under the ADA, an employee must show that "(1) he is a disabled

person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer: and (3) he has suffered an otherwise adverse employment decision as a result of discrimination" Taylor v Phoenixville School Dist., 184 F 3d 296, 306 (3d Cir. 1999)[2] We find that the appellants failed to meet this burden. Appellants failed to prove that Dr. Kanofsky was a qualified employee. See Gaul, 134 F 3d at 580. In Gaul, we established that an employee claiming disability discrimination must possess certain skills and abilities as a prerequisite for his position, and the employee must be able to carry out the "essential functions" of the job. Id. Appellants failed to show that Dr. Kanofsky was able to carry out the essential functions of his position, with or without accommodation.[3] The appellants did not demonstrate that Dr. Kanofsky either requested an accommodation or that his

[2]See also Jensen v. Food Circus Supermarkets, Inc. 541 A.2d 682,692(N..J. Super. 1986)(citing elements of a prima facie case under the NJLAD).

[3]Appellants allege that because Dr. Kanofsky's disability was obvious, he was not required to ask for an accommodation. We have previously stated that an employer's knowledge of an impairment is not sufficient to prove that the employer was aware of any desire by the employee for an accommodation. See Taylor, 184 F.3d at 313. Dr. Kanofsky did not request an accommodation and his employer was not to assume he needed one.

employer was aware of any need of one. Thus, they have failed to make out a prima facie case.

As to the age discrimination claim, an employee must establish a four-prong prima facie case of age discrimination. See Lawrence v Nat'l Westminster Bank New Jersey, 98 F. 3d 61, 65 (3d Cir. 1996). The employee must prove by a preponderance of the evidence that " (1) he is over 40 years old; (2) he is qualified for the position in question;(3) he suffered from an adverse employment decision; and (4) his replacement was sufficiently younger to permit a reasonable inference of age discrimination." Id(stating that state standards under the NJLAD are the same as under the federal ADEA standards); see also Chipollini v Spencer Gifts, Inc.,814 F.2d 893, 897 (3d Cir. 1987). Because, for the reasons stated above, the appellants have failed to show that Dr. Kanofsky was able to carry out the essential functions of his position, and thus, was qualified for it, they do not meet their burden of making a prima facie case of age discrimination.

Intentional Infliction of Emotional Distress

Appellants also assert that their claim of

intentional infliction of emotional distress was adequately alleged in their amended complaint. The elements of such a claim pursuant to New Jersey law are (1) extreme and outrageous conduct, (2) intent to commit both the act and the emotional distress, (3) proximate cause, and (4) emotional distress so severe that no reasonable person could endure it. See Buckley v Trenton Saving Fund Soc'y 544 A. 2d 857, 863(N.J. 1988). To survive a summary judgment motion, there must be sufficient evidence to raise a genuine issue of material fact for each element of the claim. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-248 (1986). We agree with the District Court's determination that there was insufficient evidence to establish these elements.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK;

Please file the foregoing Opinion.

By the Court

/s/ Jane R. Roth
Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALVIN KANOFSKY, Ph.D., and
DANIEL KANOFSKY, M.D., M.P.H.,
Individually, and as joint
Executors of the ESTATE OF
PAUL KANOFSKY, Ph.D., and
As joint executors of the
ESTATE OF PHILIP KANOFSKY

Plaintiffs,

-against - Civ.No.96–3007(DRD)

ORDER

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,
LESLIE P. MICHELSON, Ph.D.,
RON NAPIORSKI, STANLEY S.
BERGEN, JR., MARILYN BODOW,
THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, and
JOHN DOE(S) , individually
and in their official capacities,

Defendants.

C1

This matter having been opened to the Court by defendants University of Medicine and Dentistry of New Jersey, Leslie P. Michelson, Ph.D., Richard Calman, Jerry York, Ron Napiorski, Stanley S. Bergen, Jr., and Marilyn Bodow on a motion for summary judgment, and by plaintiff Estate of Paul Kanofsky, Ph.D. on a cross-motion for summary judgment and notice having been given to all parities, in consideration of the parties' submissions, arguments of counsel, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 12th day of June 2001, ORDERED that:

1.) Defendants' motion is GRANTED and the complaint is dismissed with prejudice.

2.) Plaintiff's motion is DENIED.

/s/ DICKINSON R. DEBEVOISE, U.S.S.D.J.

No. 02-1818

FILED

JUL 14 2003

OFFICE OF THE CLERK

In The
Supreme Court of the United States

Alvin S. Kanofsky, Ph.D., and Daniel Kanofsky, M.D., M.P.H., individually and as joint executors of the ESTATE OF PAUL KANOFSKY, Ph.D., and as joint executors of the ESTATE OF PHILIP KANOFSKY,

Petitioners,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, LESLIE P. MICHELSON, Ph.D., RICHARD CALMAN, JERRY YORK, RON NAPIORSKY, STANLEY S. BERGEN, JR., HOWARD J. PRIPAS, MARILYN BODOW, PRUDENTIAL INSURANCE COMPANY OF AMERICA, and JOHN DOE(S), individually and in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Respondents take issue with the Petitioner's statement of questions presented and restate the questions as follows:

1. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for handicap and disability discrimination for failing to establish the prima facie elements and for failing to establish that the reasons cited by Respondents for the adverse employment actions were a pretext for discrimination?

2. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for age discrimination for failing to establish the prima facie elements and for failing to establish that the reasons cited by Respondents for the adverse employment actions were a pretext for discrimination?

3. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's state law claim for the intentional infliction of emotional distress for failing to establish the elements for such claim?

PARTIES TO THE PROCEEDING

The caption of the case, as set forth by Respondents, contains the names of all the parties. Petitioner is the Estate of Paul Kanofsky. Respondents are the University of Medicine and Dentistry of New Jersey, Leslie P. Michelson, Ph.D., Richard Calman, Jerry York, Ron Napiorsky, Stanley S. Bergen, Jr., Howard J. Pripas and Marilyn Bodow. Petitioner's caption erroneously includes the Estate of Philip Kanofsky as a party.

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COUNTERSTATEMENT OF THE CASE

The Estate of Paul Kanofsky (the "Estate") alleges that the University of Medicine and Dentistry of New Jersey ("UMDNJ") discriminated against and mistreated Dr. Paul Kanofsky in connection with his employment.[1] To the contrary, UMDNJ transferred Dr. Kanofsky to a new position in lieu of terminating him. Once in that position, Dr. Kanofsky spent weeks in training and Respondents repeatedly identified their expectations, explained the deficiencies in Dr. Kanofsky's performance and specified those skills and abilities requiring improvement. Nevertheless, Dr. Kanofsky's performance remained unsatisfactory. Ultimately, after sixteen months in the new position, UMDNJ terminated Dr. Kanofsky because of his inability to perform his duties.

In 1993, Dr. Kanofsky was a systems analyst within UMDNJ-University Hospital's information systems and technology department ("HIST"). As an analyst, he helped to organize and analyze the hospital's vast quantity of data using a software program called "SAS." (DA117-118).[2] HIST began to overhaul the hospital's entire billing system by, among other things, eliminating SAS and implementing a new updated software package. HIST

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[1] The Estate inexplicably filed the Petition for a Writ of Certiorari also on behalf of the Estate of Philip Kanofsky. Philip Kanofsky was Paul Kanofsky's father. Philip Kanofsky's Estate is not a party in this case because, as Petitioner admits, the District Court denied its motion to add Philip Kanofsky's Estate as a party. (Petition, p. 3). For this reason, the Court of Appeals did not consider Philip's Estate to be a party to the appeal. (Pet. Appx., B2, n.1; B3).

[2] "DA" refers to Defendants/Respondents' appendix, and "PA" refers to Petitioner's appendix, submitted to the Court of Appeals.

attempted to train Dr. Kanofsky to learn this new software but, after more than a month of training, Dr. Kanofsky failed to learn the software. (DA118-119; DA122; DA169).

Instead of terminating Dr. Kanofsky, UMDNJ searched for another position that could utilize Dr. Kanofsky's skills and experiences. Respondents located a position in Academic Computing Services in the UMDNJ-New Jersey Medical School ("ACS") where Dr. Kanofsky would be able to use many of the same skills that he used in HIST, including technical knowledge and experience with computers and SAS. (DA136; DA169). In addition, in his new position in ACS, unlike the position in HIST, Dr. Kanofsky would be able to use his statistics background. (PA167).

In June 1993, UMDNJ transferred Dr. Kanofsky to ACS, where he retained his title and received the same salary. HIST eliminated Dr. Kanofsky's former position. (DA119-120; DA123; DA136-138). HIST and ACS were UMDNJ's two computer systems departments and are collectively referred to as the information systems technology group ("IST"). Among its many responsibilities, IST provides technology services to the physicians, faculty and staff of UMDNJ, who are the "clients" of IST. (DA168).

In September 1993, IST reevaluated all thirty-eight of its employees to ensure that each employee's title matched his or her respective duties and responsibilities. IST reevaluated eleven employees higher, fifteen lower, and twelve remained the same. Dr. Kanofsky was one of the fifteen employees whose title was reevaluated lower. IST changed Dr. Kanofsky's title to programmer/analyst-I from programmer/analyst-II to accurately correspond to his actual job duties because he did not, and had never,

supervised anyone. The responsibility for supervising others was the only difference between the two job titles. (DA138; DA171; DA174-180).

As a result of the change in titles, Dr. Kanofsky's salary level changed from range 28-step 7 to range 27-step 7, which decreased his annual salary by approximately $2,500. (DA15; DA136-137; DA139; DA175; DA180; DA185-186). Significantly, IST lowered the titles and salaries of many other employees, including Patrice Gregory, Dr. Kanofsky's new supervisor in ACS, and Jacob Luftman, Dr. Kanofsky's prior supervisor in HIST. (DA175-179). Within several months, however, all fifteen employees whose salaries were lowered, including Dr. Kanofsky, had their salaries returned to their earlier levels. (DA139).

Dr. Kanofsky worked in ACS from June 1993 until October 28, 1994, when he was terminated. During that sixteen month period, Respondents repeatedly worked with Dr. Kanofsky to improve his performance, but his performance remained deficient. For example, Dr. Kanofsky repeatedly failed to meet agreed upon deadlines, he failed to perform basic and essential computer tasks, he demonstrated an inability to prioritize assignments and he failed to complete his work independently. (DA5-11; DA46-86).

Incredibly, Dr. Kanofsky incurred these difficulties even though he spent nearly one month in computer training out of the sixteen months that he worked in ACS, he set and approved most project deadlines, he received repeated assistance in prioritizing his projects and he received numerous marginal and unsatisfactory evaluations that specifically identified the deficiencies in his performance. (DA4-13; DA16-20; DA137-138; DA170). In

fact, on more than twenty (20) separate occasions, Respondents identified deficiencies in Dr. Kanofsky's performance and offered suggestions on how he could improve. (DA5-11; DA46-86). Even Dr. Kanofsky's union representative conceded that UMDNJ trained Dr. Kanofsky and despite such training, it was "clear" that Dr. Kanofsky was "incapable of doing some basic tasks of the job." (DA213; DA215).

Further, the Respondents received numerous complaints from Dr. Kanofsky's clients. Two clients complained that Dr. Kanofsky, while attempting to install software on their computer, inadvertently shut off the computer he was working on. Incredibly, on both occasions, Dr. Kanofsky failed to even realize that he had shut the computer off. (DA10; DA74; DA77). Another client asked that Dr. Kanofsky not be assigned to assist him because he had "the strong impression that [Dr. Kanofsky] does not know what he is doing." (DA71). Other clients complained that despite months on an assignment, Dr. Kanofsky had been completely unproductive and failed "to accomplish anything which led to a positive result in supporting our institution." (DA96; DA97).

Dr. Kanofsky's utter lack of computer skills with DOS and other computer languages was astounding. After all, Dr. Kanofsky had spent more than ten years working with computers in HIST and, as set forth on his résumé, he professed knowledge and experience in multiple computer languages. (PA167).

Despite Respondents' considerable efforts to help Dr. Kanofsky improve his performance, Dr. Kanofsky still failed to perform his required duties. As a result, UMDNJ

terminated Dr. Kanofsky on October 28, 1994. (DA21; DA137; DA171).

Dr. Kanofsky belonged to the Hospital Professionals and Allied Employees of New Jersey, a union with a collective bargaining agreement ("CBA") with UMDNJ. (DA142). The CBA required "just cause" to terminate a member and provided each member with the right to an administrative hearing to appeal a termination. Dr. Kanofsky exercised that right and grieved his termination. (DA149-150). The administrative hearing for the grievance was held on December 6, 1994, approximately five weeks after the termination.

The hearing officer initially was skeptical of Respondents' claim as to Dr. Kanofsky's lack of computer skills. Thus, the hearing officer asked Dr. Kanofsky to identify a basic DOS command. Dr. Kanofsky failed to do so.

After hearing the evidence submitted, the hearing officer was compelled to "agree with his department that [Dr. Kanofsky] could not satisfactorily perform his job duties." (PA173). The hearing officer found that UMDNJ "made every reasonable effort, for over one (1) year, to assist Mr. [sic] Kanofsky in improving his performance to a satisfactory level but his performance remained less than satisfactory." (PA173). The hearing officer concluded that UMDNJ had "just cause" for the termination and dismissed the grievance. (PA173). Dr. Kanofsky did not appeal from that dismissal. Several days after the hearing, Dr. Kanofsky died of gastrointestinal bleeding. (DA201-202).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

In its Petition for Writ of Certiorari, the Estate seeks to appeal the Court of Appeal's affirmance of the District Court's dismissal of three of its claims. The Estate focuses exclusively on the lower courts' alleged failure to consider certain factual allegations. Throughout its Petition, the Estate rambles on, purporting to cite to alleged erroneous factual findings reached by both the Court of Appeals and the District Court, and merely repeating in various iterations its assertion that Dr. Kanofsky was brilliant. These factual allegations are erroneous, but even if they were true, the allegations would be irrelevant to the granting of the Petition. The Estate's disagreement with the lower courts' factual findings do not warrant the granting of its Petition because this Court "do[es] not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925). This policy has been followed with "particular rigor" where, as here, the "district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 457-58, 115 S. Ct. 1555, 1577, 131 L. Ed. 2d 490 (1995) (Scalia, J., dissenting).

Because the Estate only argues about alleged factual errors, the Estate fails to set forth any relevant argument justifying the granting of its Petition. The Estate ignores the standard for granting a Petition for Certiorari. The Estate cites no conflict between the Court of Appeals' decision and any other decision, it points out no important questions of law that were incorrectly decided and it identifies no departure from the accepted and usual course of judicial proceedings. Moreover, the Estate disregards

the elements for its claims and it overlooks the unrefuted facts submitted by Respondents contained in the record.

Consequently, the Estate fails to establish any basis, much less a compelling one, for this Court to exercise its discretion and grant the Petition for Writ of Certiorari. Consequently, the Estate's Petition for Writ of Certiorari should be denied.

I. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S HANDICAP AND DISABILITY DISCRIMINATION CLAIMS

The Third Circuit and the District Court correctly found that the Estate failed to establish either the prima facie elements of handicap and disability discrimination or that the reasons for the alleged adverse employment actions were a pretext for discrimination. The lower courts' factual findings were correct and supported by the record. The alleged factual errors cited by the Estate do not provide a basis for granting the Petition.

A. The Third Circuit and the District Court correctly found that the Estate failed to establish the prima facie elements for its handicap and disability discrimination claims

The District Court correctly found that the Estate failed to present evidence of the second prima facie element, namely that Dr. Kanofsky was qualified to perform the essential functions of his job with or without reasonable accommodations. The District Court also found that the Estate failed to present any evidence to establish the

fourth prima facie element, that the employer sought someone to perform the same work after he left. (Pet. Appx., A10-12). The Court of Appeals agreed with the District Court's findings. (Pet. Appx., B3-B4).

The second prima facie element is whether the employee "is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer." *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). *See also Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 306 (3d Cir. 1999). Courts apply a two-part test to determine whether an employee meets this prima facie element.

> First, a court must consider whether 'the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.' Second, the court must consider 'whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.'

Gaul, 134 F.3d at 580 (citation omitted). *See also Taylor v. Phoenixville School Dist.*, 184 F.3d at 311.

Petitioner repeatedly argues that Dr. Kanofsky was brilliant, that he received a doctorate degree and had significant work experience. This argument focuses only on the first part of this two-part test, but completely ignores the second part. Indeed, there is no real dispute as to the first half of the test because Respondents have never argued that Dr. Kanofsky had insufficient educational or employment experience. Rather, the Third Circuit and the District Court focused on Dr. Kanofsky's failure to perform the essential functions of his position. The Estate never

provided any evidence to establish this required half of the second prima facie element.

In contrast, Respondents presented overwhelming and undisputed evidence that Dr. Kanofsky, despite his education and employment experience, still failed to perform the essential functions of the job, with or without reasonable accommodation. (DA3-12; DA26-86; DA137-138; DA170). Even Dr. Kanofsky's union representative admitted that it was "clear" that Dr. Kanofsky was "incapable of doing some basic tasks of the job." (DA213; DA215). Further, the hearing officer on Dr. Kanofsky's administrative grievance reached the same conclusion. (PA173). The evidence is overwhelming and undisputed that Dr. Kanofsky failed to perform the essential functions of the job, with or without reasonable accommodation. The Third Circuit and the District Court correctly found, therefore, that Dr. Kanofsky failed to perform the essential functions of his position.

The Estate also claims that Dr. Kanofsky's partial paralysis in his right arm was obvious. Presumably, the Estate makes the contention to support an argument it made to the Court of Appeals (though not here) that Dr. Kanofsky was not required to ask for an accommodation. Such an argument is erroneous because it is insufficient for an employer simply to know of an alleged disability. In addition, the employer must know that as a result of such disability, the employee cannot perform some of his employment duties and may need an accommodation for such duties. *See Taylor v. Phoenixville School Dist.*, 184 F.3d at 313 ("the employer must know of both the disability and the employee's desire for accommodation for that disability."). *Accord Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996).

There is a fundamental distinction "between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of such disability." *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996). This distinction is crucial to anti-discrimination laws because "[e]mployers cannot assume employees are disabled and need accommodations." *Taylor v. Phoenixville School Dist.*, 184 F.3d at 313. *See also Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 515 (2d Cir. 1991) ("An employer obviously may not assume that because a person has a handicap, he or she is unable to function in a given work context.").

Anti-discrimination laws do not "require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs." *Taylor v. Principal Financial Group*, 93 F.3d at 164. This principle is true because if employers did make those assumptions, they would be acting on the very prejudices and stereotypes that anti-discrimination laws were meant to eradicate. Consequently, "[e]mployers are obligated to make reasonable accommodations only to the physical or mental *limitations* resulting from the disability that is known to the employer." *Id.* (emphasis in text). Finally, an employee must also establish that the requested accommodation was possible. *Gaul*, 134 F.3d at 580; *Van de Pol v. Caesars Hotel Casino*, 979 F. Supp. 308, 315 (D. N.J. 1997).

As a result, the issues on any handicap discrimination claim include whether the employee experienced any limitations because of a disability, whether the employer

knew of those limitations, whether the employee requested an accommodation because of such limitations and whether the requested accommodation was possible. In the present case, the Estate failed to present evidence establishing any of these issues. To the contrary, the evidence conclusively demonstrated that Dr. Kanofsky's condition was irrelevant to his job performance. Dr. Kanofsky was physically able to perform his duties, he just failed to competently do so. (DA5-11; DA46-86).

Further, Dr. Kanofsky never requested an accommodation. In fact, he never claimed that his condition affected his job performance, including the installation of computer software. (DA14; DA120; DA189; DA189-193; DA199). Dr. Kanofsky's failure to request an accommodation precludes the Estate from establishing that Dr. Kanofsky was qualified. *Jovanovic v. In-Sink-Erator Div. of Emerson Elec.*, 201 F.3d 894, 899 (7th Cir. 2000). *See also Taylor v. Principal Financial Group, Inc.*, 93 F.3d at 165 ("it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining" an accommodation). Because the Estate failed to provide any evidence that Respondents were aware of any limitations suffered by Dr. Kanofsky, or that Dr. Kanofsky requested an accommodation, it failed to establish the second prima facie element.

The Estate also cannot establish the fourth prima facie element. Although the Estate ignored this element in its Petition for Writ of Certiorari, the Estate previously admitted that it had no evidence on this issue, stating that "[i]t is unclear whether Dr. Kanofsky was replaced by a younger worker (with no disability) or whether his job duties were transferred to younger workers . . . " (DA218). Because of this admission, the Estate failed to establish the

fourth prima facie element for its disability discrimination claim.

B. The Court of Appeals and the District Court correctly found that the Estate failed to establish that Respondents' reasons for Dr. Kanofsky's termination were a pretext for discrimination

Even if the Estate had evidence to establish its prima facie case, Respondents satisfied the burden of production of articulating a reason for their actions, as required by *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). UMDNJ terminated Dr. Kanofsky because he failed to meet deadlines, failed to prioritize assignments, failed to work independently and failed to perform basic computer tasks. (DA2-12; DA16-20; DA138; DA170).

The Estate must then present evidence demonstrating either that a discriminatory reason more likely than not was a motivating factor in the adverse employment action or that Respondents' proffered reason for the termination was a pretext for discrimination. *Lawrence v. National Westminster Bank*, 98 F.3d 61, 66 (3d Cir. 1996). To prove pretext, the Estate must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered reasons for its action that a reasonable fact finder could find them unworthy of credence and hence infer that the employer did not act for the non-discriminatory reason." *Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994). Plaintiff failed to establish these elements.

The Estate never attempted to establish that a discriminatory reason was more likely than not the motivating factor. Instead, the Estate made vague and rambling arguments concerning pretext. For example, the Estate argued that Dr. Kanofsky was brilliant at his former position, that he saved UMDNJ millions of dollars while in HIST and that the reviews of his work suddenly changed in 1993. The Estate also claimed that Patrice Gregory, one of Dr. Kanofsky's ACS supervisors, recommended that he be transferred, not terminated.

In these arguments, the Estate simply contends that UMDNJ made the wrong decision in terminating Dr. Kanofsky. The issue, however, is not whether Dr. Kanofsky's performance was inadequate, but only whether UMDNJ truly believed that Dr. Kanofsky's performance was inadequate. So long as Respondents truly believed their asserted reasons, then pretext has not been shown. *Watson*, 207 F.3d at 222. In other words, the Estate had to present evidence that UMDNJ fabricated its reasons for terminating Dr. Kanofsky and that it did not really terminate him for such reasons. *Swider v. Ha-Lo Industries*, 134 F. Supp. 2d 607, 627 (D. N.J. 2001). The Estate presented no evidence on that issue.

To the contrary, Ms. Gregory agreed with Ms. Bodow and Dr. Michelson (the supervisors who decided to terminate Dr. Kanofsky) that Dr. Kanofsky's performance had been deficient and, despite having marginally improved, remained deficient. (DA195-197). Thus, all of Dr. Kanofsky's supervisors agreed that Dr. Kanofsky's performance was inadequate. The difference of opinion over whether to terminate Dr. Kanofsky for his inferior performance does not establish pretext. Rather, it constitutes second-guessing of the Respondents' decision, which is irrelevant

to pretext. *Silvestre v. Bell Atlantic Corp.*, 973 F. Supp. 475, 483 (D. N.J. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).

The reason that the Estate has never focused on the correct issue is that the Estate had no evidence relating to that issue. In fact, Dr. Kanofsky's ACS supervisors complained about the same deficiencies in Dr. Kanofsky's performance for more than a year. During that time, on at least twenty (20) separate occasions, Respondents documented deficiencies in Dr. Kanofsky's performance. (DA5-11; DA46-86). Despite Respondents' efforts, Dr. Kanofsky's work never became satisfactory.

In addition, Dr. Kanofsky's deficiencies with computers were almost unimaginable, even though he claimed to be proficient in multiple computer languages. (PA167). As a result, the Respondents received numerous complaints from clients about Dr. Kanofsky's performance. For example, on at least two separate occasions when he was installing software, Dr. Kanofsky inadvertently turned the computer off, yet he failed to realize that fact even after the computer screen went blank. (DA10; DA74; DA77). One client even put a bottle cap over the computer on-off switch to prevent Dr. Kanofsky from inadvertently turning the computer off again. (DA77).

Another client specifically requested that Dr. Kanofsky not be assigned to his future projects. The client explained that on one occasion, Dr. Kanofsky attempted to help with a simple project for over one hour.

> Unfortunately, it soon became clear that I knew more about DOS than Paul does and finally managed to get him to stop 'helping' me. I went to see Cliff Green, who solved the problem in less than 2 minutes.

> After many years of dealing with knowledgeable people in the ACS, I am stunned to encounter someone in your organization who seems to have a total lack of skill in dealing with computers. I have no confidence in Paul Kanofsky and do not want him to have any chance of making a mistake in analyzing data that will eventually appear in a publication.

(DA71). *See also* (DA96-98). Further, the hearing officer on Dr. Kanofsky's administrative grievance, and Dr. Kanofsky's union representative, both agreed with the Respondents that Dr. Kanofsky failed to perform his required duties. (DA213; DA215; PA167).

Significantly, the Estate never disputed that Dr. Kanofsky repeatedly missed deadlines, failed to prioritize assignments and could not perform his computer assignments competently or timely. Thus, the Third Circuit and the District Court correctly found that there is no evidence that the reasons cited by Respondents for their decision to terminate Dr. Kanofsky were pretextual. Therefore, the Estate's disability discrimination claim based on Dr. Kanofsky's termination was appropriately dismissed.

C. The Third Circuit and the District Court correctly found that the Estate failed to establish that UMDNJ's reasons for Dr. Kanofsky's transfer were a pretext for discrimination

The Estate also argues that Dr. Kanofsky's transfer in June 1993 from HIST to ACS was due to discrimination. The Estate cannot allege discrimination for this event because the claim is barred by the two year statute of limitations. *Poveromo-Spring v. Exxon Corp.*, 968 F. Supp. 219,

224-25 (D. N.J. 1997). The Estate did not file its complaint until June 1996, about one year beyond the statute of limitations. (PA20). In any event, the transfer, which only changed Dr. Kanofsky's duties, was not an adverse employment action. *See Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) ("Changes in duties or working conditions that cause no materially significant disadvantage, such as Harlston's reassignment, are insufficient to establish the adverse conduct required to make a prima facie case."). *See also Crady v. Liberty National Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

Even if the transfer could be cited as an adverse employment action, the Estate failed to establish that the reasons for Dr. Kanofsky's transfer from HIST to ACS were pretextual. UMDNJ transferred Dr. Kanofsky because, after a month of training in the Spring of 1993, he could not learn HIST's new computer system. (DA118-119; DA122; DA169).

The Estate argues that because the new computer system was not fully operational until two years following the transfer, the system could not be the cause for the transfer. In essence, the Estate contends that it makes no sense to transfer an employee until the software is actually installed. This argument constitutes improper second-guessing of the timing of the transfer and whether the decision to transfer was prudent. Simply because it took longer than expected to install new software and then to

transfer the data and billing information to that new system does not establish pretext.[3]

The Estate has never focused on the real issue, namely whether or not UMDNJ truly believed that Dr. Kanofsky was unqualified for the position in HIST because he failed to learn the new software. Notably, the Estate never disputed that UMDNJ attempted to train Dr. Kanofsky on the new software package for over a month and that Dr. Kanofsky failed to learn it. Consequently, the Estate failed to establish that the reasons given for the transfer were a pretext for discrimination.

II. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S AGE DISCRIMINATION CLAIM

The Third Circuit and the District Court correctly found that the Estate could not establish the prima facie elements for its age discrimination claim, and it could not establish that UMDNJ's cited reasons were a pretext for discrimination. (Pet. Appx., A12-14). The District Court and the Third Circuit agreed that the Estate failed to establish the second prima facie element (that Dr. Kanofsky was qualified for the position) for the reasons set forth *supra*, Point I-A. The Courts also found that the Estate could not establish the fourth element (that he was

[3] The Estate also argues that HIST's advertisement for a job opening more than fifteen months after Dr. Kanofsky's transfer is evidence of pretext. The argument is senseless because HIST advertised for an employee to work on the new software package, the one that Dr. Kanofsky was unable to learn. (DA123; PA139).

replaced by a sufficiently younger person to create an inference of age discrimination) because of the Estate's admission that it had no knowledge whether Dr. Kanofsky was ever replaced. (Pet. Appx., A13).

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), this Court explained that whether the employee was replaced by someone who was "substantially younger" than the plaintiff is probative of age discrimination. If an employee was replaced by someone substantially younger, and the other prima facie elements were established, there would then be "an inference that an employment decision was based on an illegal discriminatory criteria." *Id.*, 517 U.S. at 312 (quoting *International Broth. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). *See also Showalter v. University of Pittsburgh Med. Center*, 190 F.3d 231, 236 (3d Cir. 1999); *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997). This element of the prima facie case is the same whether plaintiff's claim is based on federal or New Jersey discrimination laws. *Keller*, 130 F.3d at 1108; *Swider*, 134 F. Supp. 2d at 625.

This element is fundamental to an age discrimination claim because without proof that the employee was replaced by a sufficiently younger employee, there would be no basis to infer that the employer acted with a discriminatory motive based on age. *Marzano v. Computer Science Corp.*, 91 F.3d 497, 508 (3d Cir. 1996). Without a discriminatory motive, there can be no discrimination claim. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 356 (3d Cir. 1999) (finding that *O'Connor* and other Supreme Court precedent require "evidence adequate to create an inference that an employment decision was based on an

illegal discriminatory criteria"); *Swider*, 134 F. Supp. 2d at 626 (dismissing age discrimination claim because the plaintiff "failed to establish that he was replaced by someone sufficiently younger to give rise to an inference of age discrimination.").

Because the Estate admitted that it has no evidence concerning the age of the person who replaced Dr. Kanofsky, either when he was transferred or when he was terminated, there can be no doubt that the Estate failed to establish this element. (DA218).

III. THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE ESTATE'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Pursuant to *Buckley v. Trenton Sav. Fund Soc'y*, 111 N.J. 355, 366, 544 A.2d 857, 863 (1988), the four elements for a claim for intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) intent to commit both the act and the emotional distress; (3) proximate cause; and (4) that the emotional distress was so severe that no reasonable person could endure it. (Pet. Appx., A15). The Third Circuit affirmed the District Court's finding that the Estate failed to allege "acts even approaching that which is required" to meet these elements and, therefore, dismissed the claim. (Pet. Appx., A15).

In its Petition, the closest the Estate comes to addressing these elements occurs when it makes vague arguments that UMDNJ terminated Dr. Kanofsky even though it knew he had cancer and was undergoing chemotherapy. This argument is not supported by any evidence

in the record. In fact, the undisputed evidence belies this allegation. UMDNJ terminated Dr. Kanofsky on October 28, 1994 and Dr. Kanofsky did not even learn that he had cancer until November 18, 1994, three weeks after his termination. (PA163; DA220).

There is also no evidence that Dr. Kanofsky suffered any emotional distress, not to mention emotional distress "so severe that a reasonable person could not be expected to endure it." Notably, there is no evidence from Dr. Kanofsky, nor is there any evidence from any physician on this issue. *See Taylor v. Metzger*, 152 N.J. 490, 515, 706 A.2d 685, 697 (1998) (finding that a plaintiff asserting a claim for intentional infliction of emotional distress must show a "severe and disabling emotional condition which may be generally recognized and diagnosed by professionals trained to do so.").

Even if there were some evidence supporting the Estate's allegations, however, the allegations still fail to meet the high threshold required for this tort. The alleged conduct does not "exceed all bounds of decency," nor is it regarded as "atrocious and utterly intolerable in a civilized community." *Buckley*, 111 N.J. at 366, 706 A.2d at 863. Terminating an employee, even one who is ill, simply cannot be considered outrageous and beyond the bounds of decency because "while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event and cannot provide a basis for recovery of intentional infliction of emotional distress." *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988). *See also id.* ("it is extremely rare to find conduct in the employment context which will rise to the level of outrageousness necessary to provide a basis for recovery.").

Consequently, the Third Circuit correctly affirmed the District Court's dismissal of the Estate's intentional infliction of emotional distress claim.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that there is no compelling reason to grant the Estate's Petition. Consequently, the Estate's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 02 - 1818

IN THE
SUPREME COURT OF THE UNITED STATES

ALVIN S.KANOFSKY, PhD.,and DANIEL KANOFSKY, M.D.,M.P.H, individually and as joint executors of the ESTATE OF PAUL KANOFSKY, Ph.D., and as joint executors of the ESTATE OF PHILIP KANOFSKY,

Petitioners

Dr. ALVIN S. KANOFSKY - PETITIONER

Vs.

UNIVERSITY OF MEDICINE AND DENTISTRY of NEW JERSEY,LESLIE P. MICHELSON, Ph.D., RICHARD CALMAN, JERRY YORK,RON NAPIORSKY, STANLY S. BERGEN, JR., HOWARD J. PRIPAS, MARILYN BODOW, PRUDENTIAL INS. CO., AND JOHN DOE(S),individually and in their official capacities

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES 3RD CIRCUIT COURT OF APPEALS, ENTERED IN PHILADELPHIA, PA., NO. 01-2860.

DR. ALVIN S. KANOFSKY
229 E. CHURCH STREET
BETHLEHEM, PA. 18018
610 – 867 – 8064

BEST AVAILABLE COPY

Response to new questions raised by Respondents, who took issue with Petitioners original questions in Petition and thus ignored Petitioner's questions.

We present below both sets of questions.

Respondents New Questions:

1.Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for handicap and disability discrimination for failing to establish the prima facie elements and for failing to establish that the reasons cited by Respondents for the adverse employment actions were a pretext for discrimination?

2.Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky's claims for age discrimination for failing to establish the prima facie elements and failing to establish that the reasons cited by Respondents for the adverse employments actions were a pretext for discrimination?

3. Did the Court of Appeals correctly affirm the District Court's dismissal of the Estate of Paul Kanofsky state law claim for the intentional infliction of emotional distress for failing to establish the elements for such claim?

Petitioner's Original Questions(Without supporting comments.)

1. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals ignore arguments in favor of Dr. Kanofsky being able to perform his duties?

2. Did Judge Debevoise of the Third Circuit and the Third Circuit Court of Appeals ignore arguments in consideration of his disabilities?

3. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals totally disregard consideration of the facts?

4. Did Judge Debevoise of the Third Circuit Court and the The Third Circuit Court of Appeals ignore arguments in the brutal firing of Dr. Kanofsky, first in the initial termination meeting and then totally ignoring mitigating circumstances of coming off a sick bed after cancer chemotherapy to appeal his firing from the first meeting.

5. Has Dr. Kanofsky's competency been subsequently vindicated?

6. Has Dr. Kanofsky's Whistle Blowing Activities been subsequently vindicated?

7. Should Justice Rendell have recused herself from the case?

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RESPONSE TO RESPONDENT:

Attorney Dauber (and presumably the Appellees) continue to ignore the facts of the case, and in addition, the eight questions raised by the petitioner in regard to the case. Attorney Dauber states that he takes issue with the questions raised by the petitioner, and he does in no way address the questions – thus validating them by his lack of rebuttal.

He instead continues to insist that Dr. Paul Kanofsky was terminated for valid reasons and that the petitioners had not established a prima facie case:

1. Dr. Kanofsky was terminated because he was unable to perform his duties.

2. Dr. Kanofsky was adequately trained.

3. Dr. Kanofsky did not request an accommodation for his disability and (in the case of age discrimination)

4. Dr. Kanofsky was not replaced by a younger worker.

5. In the count of Wrongful Death, Dr. Kanofsky was not treated in a malicious manner to bring about his death due to proximate causes from their treatment

These arguments continue to be erroneous since they are based on incorrect alleged facts accepted by the District Court Judge Debevoise, and not even considered by the appeals court. Once these erroneous facts are accepted, Attorney Dauber argues that the Supreme Court has no jurisdiction on lower courts misrepresenting and ignoring the factual situation.

Actually, Attorney Dauber and the appellees arguments further support our case. We consider each of their supposedly prima facie elements.

1. In his arguments in support of the first element – Dr. Kanofsky was terminated because he was unable to perform his duties- he focuses primarily on Dr. Kanofsky's lack of knowledge of DOS, the Microsoft PC Disc Operating System. In fact, only a very small portion of Dr. Kanofsky's duties involved the use of DOS. His primary duties , eighty percent of his time, was on performing statistical analysis of Medical Experiments. Where Attorney Dauber and the appellees do consider his statistical duties, they refer to his being late in completing his assignments. Numerous testimony was given that Dr. Kanofsky was working late weekdays and through the weekends to complete his statistical programming assignments. The deadlines he was given were totally unrealistic in order to perform competent

complete statistical analysis of the data, again as stated in numerous instances by expert witnesses, such as Dr. Thaler and Dr.Roberts and other co-workers knowledgeable in statistics such as Mr. Marty Feuerman and Mr. Gil Cohen.Their complaint of the inability to complete assignments on time reflect the ignorance of his supervisors as to the proper statistical techniques needed to analyze the data.

Even with DOS, there was numerous testimony by many, including his immediate supervisor, Patrice Gregory, that his DOS skills were adequate and improving.

2.With respect to the second Prima Facie Element – that Dr. Kanofsky was adequately trained- again Attorney Dauber supports our case. He states that Dr. Kanofsky was given all of one month of training in DOS. This is a ridiculously short amount of time to learn a system as complicated as DOS. As given in testimony taken during deposition, for example by Marty Feuerman, it requires years to become expert in DOS. As well, the training was given sporadically, and in no formal organized way, mainly by his immediate supervisor, Patrice Gregory. As well, it was given during a period when Dr. Kanofsky was suffering from severe mental depression, for which he was subsequently out for a period of months under a psychiatrist's care. This was well documented in

depositions. Attorney Dauber and the appellees totally and conveniently ignore the mental disability aspect of the case. Of course, as is well known, one of the symptoms of mental depression is the inability to learn and concentrate.

3. For the third aspect of the Prima Facie Case - that Dr. Kanofsky did not request an accommodation for his disability- Attorney Dauber again supports our case. Dr. Kanofsky frequently requested more time to complete his installations of SAS, the statistical analysis program. As well, he requested more time to complete his statistical analysis duties. As Attorney Dauber states, due to his physical disability, he did inadvertently shut off the computer because of lack of co-ordination in installing the disks. It was obvious that the physical disability was impairing his duties.

As to his mental disabilities, he did request time to be out on sick leave with notes from his psychiatrist. Upon his return, his supervisors heaped numerous tasks on him immediately, to further break him down. During the final termination hearing on October 28, he and the union representative, Nina Jackowitz, asked for accommodations for his disability, and for sick leave for his cancer which was evident to everyone

present by the swollen lymph nodes in his neck.

4.In regard to the fourth prima facie element- that Dr. Kanofsky was not replaced by a younger worker -again Attorney Dauber supports our case, by admitting that it was several years after Dr. Kanofsky left his first position till they hired more people – in fact they hired tens of people , many of them much younger than Dr. Kanofsky. Dr. Kanofsky was the only individual transferred out the department, even though as Attorney Dauber admits it took two years for them to replace the programs that Dr. Kanofsky was expert in. This was as well, a period when many institutions were fraudulently up-coding, and thus it would have been also essential to move Dr. Kanofsky, an honest and ever vigilant watchdog of the billing systems out of his position in order for these methods to be practiced undetected. Dr. Kanofsky had previously discovered errors in billing that resulted in the university recovering over $50 Million dollars, something that Attorney Dauber conveniently omits.

As well, Attorney Dauber omits any mention of the fact that the University of Medicine and Dentistry is being totally restructured as a result of its being judged to be mediocre in quality by the Governor's prestigious committee of experts . UMDNJ will be merged

into Rutgers and New Jersey Institute of Technology(NJIT), with the administration moved to Trenton, thus vindicating Dr. Kanofsky's pursuit of excellence and honesty.

5 Finally, in the final element of the prima facie case - Wrongful Death - Attorney Dauber presents the brutal malicious way in which they handled Dr. Kanofsky's, termination hearing on October 28, 1994, and then his final appeal hearing on December 6. Dr. Kanofsky during this period was dying from lymphoma, cancer of the lymph glands. This was most probably initially brought on by the stress of his job. On October 28, the day of the termination hearing, he was threatened that they would fight tooth and nail to cut off any benefits unless he signed a waiver that he would not sue the university. Dr. Kanofsky refused, and they subsequently acted to cut off all benefits that he might obtain. At that hearing, the union representative and Dr. Kanofsky made it known to those present that he was going in the next day for a biopsy to detect cancer. He had enormous lumps in his throat, and it was evident to everyone that he was seriously ill. The union representative, Nina Jackowitz, pleaded that they put Dr. Kanofsky on sick leave and not terminate him at this time, thus requesting another accommodation. Dr. Kanofsky refused to sign the waiver, and he left that meeting severely depressed by his treatment and the

termination. He subsequently entered the hospital, cancer was detected , and he spent weeks in Jefferson hospital in Philadelphia receiving chemotherapy. He came out of the hospital shortly before the December 6 appeal hearing , even though he was deathly ill. He should not have been allowed to attend the hearing, given the state of health he was in. The union representative present, Michael Slott, testified that Paul did not seem himself, his mental processes were slow and distracted as one would expect for someone coming immediately from a hospital sickbed where he had received intense chemotherapy. As Attorney Dauber states, he was asked one question on DOS, which Dr. Kanofsky did not answer correctly, and with that the hearing officer ended the hearing and declared that he was indeed terminated. I doubt if anyone could have answered the question in the same physical state as Dr. Kanofsky. Dr. Kanofsky left that hearing severely despondent. The following day, he appeared at the office of a Prudential Agent in New Jersey, Robert Cohen, attempting to get his insurance policy transferred. Mr. Cohen, in depositions, described Dr. Kanofsky at that meeting as being in a very sick and weakened state, leaving his discussion with Mr. Cohen frequently to go to the bathroom. Dr. Kanofsky filled out the necessary forms, but he could not make a decision on the beneficiary amount, and he left the forms unsigned.

Dr. Kanofsky was next seen by the plaintiff's cousin that evening ,having dinner at a restaurant in Northeast Philadelphia. He was not seen alive after that. The plaintiffs did not hear from him for several days. Finally, Dr. Daniel Kanofsky forced his way into Dr. Kanofsky's apartment, and found him lying dead on his bed. He apparently had bled to death. In depositions, his Oncologist, Dr. Rose, stated that stomach bleeding was most likely brought on by the aggravation of that final appeal hearing, acting in conjunction with the chemotherapy treatment. It was a brutal malicious final treatment of a dedicated employee, resulting in his death.

Finally, we repeat the questions we raised in our petition to the Supreme Court.

1. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals ignore arguments in favor of Dr. Kanofsky being able to perform his duties?

2. Did Judge Debevoise of the Third Circuit and the Third Circuit Court of Appeals ignore arguments in consideration of his disabilities?

3. Did Judge Debevoise of the Third Circuit Court and the Third Circuit Court of Appeals totally disregard consideration of the facts?

4. Did Judge Debevoise of the Third Circuit Court and the The Third Circuit Court of Appeals ignore arguments in the brutal firing of Dr. Kanofsky, first in the initial termination meeting and then totally ignoring mitigating circumstances of coming off a sick bed after cancer chemotherapy to appeal his firing from the first meeting.

5. Has Dr. Kanofsky's competency been subsequently vindicated?

6. Has Dr. Kanofsky's Whistle Blowing Activities been subsequently vindicated?

7. Should Justice Rendell have recused herself from the case?

8. Does the Federal Justices consistent dismissal of ADA and ADEA act lawsuits constitute cruel and unusual pundishment to those wrongfully discharged and their families? The victims and families are twice victimized?

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CONCLUSION:

In conclusion, based on numerous considerations of law and concerns of national public policy as stated above and in more detail in the original petition, petitioners pray that the Supreme Court will consider this case at this time.

Respectfully submitted:

Alvin S. Kanofsky

Dr. Alvin S. Kanofsky

Date: 9/25/03